

FCC MAIL SERVICE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Amendment of Section 73.202(b)

FM Table of Allotments,

FM Broadcast Stations.

(Seymour and Sellersburg, Indiana)

MB Docket No. 03-98

RM-10688

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 4, 2004**Released: August 9, 2004**

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Notice Of Proposed Rulemaking issued at the request of INDY LICO, Inc., licensee of Station WGRL(FM), Noblesville, Indiana, and S.C.I. Broadcasting, Inc., licensee of Station WQKC(FM), Seymour, Indiana ("Petitioners"),¹ proposing the substitution of Channel 230A for Channel 229B at Seymour, Indiana, and the reallocation of Channel 230A from Seymour to Sellersburg, Indiana, as the community's first local transmission service, and the modification of the license for Station WQKC(FM) to reflect the changes.² Petitioners filed comments in support of the proposal and reiterating their intentions to effectuate the changes specified in the proposal. Opposing comments were filed by Evangel Schools, Inc., and Eric Heyob. Petitioners filed reply comments.

2. Petitioners filed this proposal for reallocation in accordance with the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license while not affording other interested parties the opportunity to file competing expressions of interest in the proposed allotment.³ In considering a reallocation proposal, we compare the existing arrangement of allotments to the proposed arrangement of allotments in order to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based on the FM Allotment priorities.⁴

3. In support of the petition, Petitioners state that Channel 230A can be allotted at Sellersburg in accordance with Section 73.207(b) of the rules, and it will place a 70 dBu signal over the entire community from the proposed reference site.⁵ The allotment will provide Sellersburg, 2000 U.S. Census population of 6,071 persons, with its first local aural transmission service, and will not deprive

¹ Petitioners have the same parent corporation. In the event that Channel 229B is removed from Seymour, INDY LICO would be able to relocate the Station WGRL transmitter site.

² This proposal was originally filed as an amended petition at the deadline for counterproposals in MM Docket No. 01-143. That docket was terminated, and this proceeding was initiated to consider the amended proposal as a new petition for rule making.

³ See *Change of Community R&O*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁴ See *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 91 (1988). The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)].

⁵ 47 C.F.R. 73.202(b).

Seymour, 2000 U.S. Census population of 18,101 persons, of its sole local aural transmission service. Two stations, WZZB(AM) and noncommercial educational WJLR(FM), will remain licensed to Seymour. Petitioners also state that this proposal will eliminate the existing short spacings to Stations WMMG-FM, Channel 228A, Brandenburg, Kentucky, and WCFJ, Channel 229B, Miamisburg, Ohio. Finally, Petitioners claim that the Sellersburg relocation will permit them to serve an additional 893,620 listeners. The areas losing service will continue to be well served by more than five aural services.

4. Petitioners also note that Sellersburg is within the Louisville, Kentucky, Urbanized Area. Petitioners provide a showing that Sellersburg is an independent community deserving of a first local service preference based on the factors enumerated in *Faye and Richard Tuck*.⁶ We sought comment on this showing.

5. Evangel argues that Sellersburg should not be given a first local service preference because it is not independent of the Louisville, Kentucky Urbanized Area pursuant to the factors delineated in commission precedent.⁷ Heyob raises concerns about the proposal because it will remove the community's only commercial FM service and Seymour will be left with an AM daytime-only station and a noncommercial educational FM station. In addition, Heyob questions whether the licensee of Station WQKC(FM) intends to serve the small community of Sellersburg, but rather, the larger community within the Urbanized Area.

6. We have determined that Sellersburg is independent of the Louisville, Urbanized Area and deserves a first local service preference. This determination was reached after careful consideration of the factors set forth in *Tuck*, which we have stated are a measure of a community's independence from the central city of the urbanized area of which it is a part. With respect to signal population coverage, the 60 dBu contour will cover 59.5% of the Louisville Urbanized Area. This does not preclude a finding of a first local service. As to relative size and proximity, Sellersburg has 2.4% of the population of Louisville and is located 9.9 miles away from Louisville. Such statistics do not preclude a favorable determination of first local service.⁸ These are pertinent, but less significant factors than evidence of independence. With respect to Sellersburg's independence of the Louisville Urbanized Area, we consider the eight factors outlined in our cases.⁹ Sellersburg meets a majority of those factors.

7. First, Petitioners have shown that there are several employers in the community of Sellersburg which offer opportunities for employment. Included among them are manufacturing companies Century Industries, SerVend International and Haas Cabinet Company, as well as Vencore, a nursing home/medical facility, as well as many small businesses. Evangel questions the sufficiency of Sellersburg's employment opportunities by arguing that the Census records show that only 13.8% of

⁶ *Faye and Richard Tuck* "Tuck," 3 FCC Rcd 5374 (1988).

⁷ *Id.*

⁸ See *Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 (1996) (.01% of population of the central city and 17.8 miles from the central city); *Cadiz and Oak Grove, Kentucky*, 10 FCC Rcd 10785 (1995) aff'd 11 FCC Rcd 22208 (1996) (2.93% of the population of the central city and 6.5 miles away from the central city).

⁹ There are eight factors relevant to interdependence: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether the community's leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the municipal services such as police, fire protection, schools, libraries. See *Tuck, supra*; *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); see also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951)

Sellersburg's working population are employed in Sellersburg and thus a majority of the working population is employed in Louisville. Evangel correctly points out that a majority of the working population of Sellersburg works outside of the community. However, Petitioners also correctly argue that the standard is not whether a majority of the population works in the community. Further, we have made a finding of independence with a smaller proportion of the working population employed within the community where the other factors weighed in favor of independence, as they do here.¹⁰ We are satisfied that Sellersburg has opportunities for employment and that a large enough population is employed within the community to support its independence. Sellersburg has sufficient indicia of independence to qualify for a first local service preference, as discussed below. Under the second criterion, Petitioners state that Sellersburg is served by the *Evening News*, a west Clark County area newspaper which is published in neighboring Jeffersonville, Indiana. The newspaper contains local news for Sellersburg residents and advertising for Sellersburg businesses. Although Evangel challenges the validity of this newspaper as a Sellersburg paper because it is published in a nearby city, we find that it is sufficient because it covers Sellersburg and is not a Louisville paper. To show independence under the third criterion, Petitioners state that the Deputy Town Clerk/Treasurer, the administrative officer of the town, claims that residents of Sellersburg perceive their community as being separate of Louisville. No affidavit or signed statement to this effect is included. Petitioners also point out that the community has its own unique history and identity as a community that was established 1846 and formally incorporated in 1890. Evangel challenges this showing, but makes no showing to establish the opposite proposition, that the residents perceive themselves to be part of the larger Louisville Urbanized Area. We find this showing to be sufficient to weigh in favor of independence.

8. Fourth, Petitioners show that the community has its own independent elected Town Council and President. The Town also has a Town Clerk/Treasurer who oversees all administrative functions of town government, including the town departments, boards, commissions and committees. Despite Evangel's attempt to discount this, Sellersburg firmly meets this criterion. Fifth, the town has its own zip code and separate listings in the telephone directory, which, although it is a joint phone book with two other communities, is separate from Louisville. Sellersburg meets this factor in favor of independence. Sixth, Sellersburg has numerous small businesses, several health care providers, recreation facilities, churches, and civic organizations. This, too, is sufficient to satisfy this criterion. Seventh, Sellersburg is part of the Louisville advertising market, but does have the Clark County paper to serve local advertisers. Eighth, Sellersburg's library is run by Clark County, but its police and fire protection are independent. It has its own public school system, provided through the West Clark Community School Corporation, with two elementary schools, a junior high and a high school. There are also parochial schools and a local college. The town provides municipal services to its residents: police and fire protection, water and sanitation services, road maintenance and building maintenance for town facilities. All of these support a finding of independence.

9. Accordingly, Sellersburg solidly meets five of the criteria and two more could weigh in its favor, so we determine that Sellersburg is a community deserving of a first local service.

10. We disagree with Evangel's contention that awarding Sellersburg a preference as a first local service is inconsistent with the Commission decision in *KFRC*,¹¹ which held that Richmond, California did not merit a preference as a first local service. That proceeding involved a six-way comparative hearing for the facilities of former AM Station KFRC, San Francisco, California. Two of the applicants specified Richmond, California, as their proposed community of license even though they had proposed facilities and coverage identical to the facilities and coverage by the other applicants who had

¹⁰ See e.g., *Albemarle and Indian Trail, North Carolina*, 16 FCC Rcd 13876, 13880 (2001) (11.3%).

¹¹ *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); see also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

proposed San Francisco as the community of license. In order to preclude an anomalous and artificial resolution of that comparative application proceeding, the Commission did not afford Richmond a dispositive preference as a first local service. Even though the communities of Richmond and Sellersburg have similar characteristics regarding independence from an Urbanized Area, the situations are distinguishable. Unlike that proceeding, Petitioners did not propose an allotment to Sellersburg which had been previously licensed to Louisville. Similarly, Petitioners did not seek a preference as a first local service to Sellersburg at the expense of a competing applicant who has proposed identical facilities as a Louisville station. Rather, as required by *Community of License*, it is incumbent upon us to determine whether this reallocation proposal would result in a preferential arrangement of allotments. It is our view that reallocation Channel 230A from Seymour to Sellersburg as a first local service does, in fact, result in a preferential arrangement of allotments.¹²

11. In addition, this reallocation will serve the public interest. An engineering analysis shows that Channel 230A can be allotted at Sellersburg at a site 11.5 kilometers (7.1 miles) south of the community.¹³ Sellersburg will gain its first local aural transmission service and Seymour will retain local aural transmission service from daytime only Station WZZB(AM) and noncommercial educational Station WJLR(FM), both of which are considered transmission service under our rules.¹⁴ Petitioners show that the substitution of Channel 230A for Channel 229B from Seymour to Sellersburg will eliminate the existing short-spacings to Station WFCJ, Miamisburg, Ohio, and Station WMMG-FM, Brandenburg, Kentucky, and will allow Station WQKC to serve an additional 514,607 listeners, without creating any underserved areas. Finally, contrary to Heyob's assertion, Petitioners have pledged to build the station in Sellersburg and serve the community with its first local aural transmission service.

12. This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4). The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

13. IT IS ORDERED That effective, September 23, 2004, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED for the communities listed below, to read as follows:

<u>Community</u>	<u>Channel</u>
Seymour, Indiana	---
Sellersburg, Indiana	230A

14. IT IS FURTHER ORDERED That pursuant to 47 U.S.C. Section 316(a), the license of S.C.I. Broadcasting, Inc., for Station WQKC(FM), Channel 229B, Seymour, Indiana, IS MODIFIED to specify operation on Channel 230A at Sellersburg, Indiana, subject to the following conditions:

¹² *See also Suburban Community Policy, the Berwick Doctrine, and the DeFacto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Co. v. FCC*, 787 F. 2d 645 (D.C. Cir. 1986).

¹³ Channel 230A can be allotted at Sellersburg at coordinates 38-17-41 NL and 85-45-07 WL.

¹⁴ *See Change of Community MO&O*, 5 FCC Rcd 7094 (1990).

- a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- b) Upon grant of the construction permit, program tests may be conducted in accordance with 47 C.F.R. Section 73.1620; and
- c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to 47 C.F.R. Section 1.1307, unless the proposed facilities are categorically excluded from environmental processing.

15. Pursuant to 47 C.F.R. Sections 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, S.C.I. Broadcasting, Inc., is required to submit rule making fee in addition to the fee required for the application to effect the change of community.

16. IT IS FURTHER ORDERED that the Oppositions filed by Evangel Schools, Inc., and Eric Heyob ARE DENIED.

17. IT IS FURTHER ORDERED that the Petition for Rule Making filed by S.C.I. Broadcasting, Inc. IS GRANTED.

18. IT IS FURTHER ORDERED That the Secretary of the Commission shall send by Certified Mail Return Receipt Requested, a copy of this *Order* to the following:

Mark N. Lipp, Esq.
J. Thomas Nolan, Esq.
Vinson & Elkins L.L.P.,
The Willard Office Building,
1455 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004-1008
(Counsel to Petitioners)

Howard J. Barr, Esq.
Womble, Carlyle, Sandridge & Rice
Seventh Floor
1401 Eye Street, N.W.
Washington, DC 20005
(Counsel to Evangel Schools, Inc.)

Eric Heyob
15990 S. Jonesville Road
Columbus, Indiana 47201

19. For further information concerning this proceeding, contact Victoria M. McCauley (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau